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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 213

INDIAN TOWING COMPANY, INC., ET AL.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

REPLY BRIEF ON BEHALF OF THE PETITIONERS.

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MAY IT PLEASE THE COURT:

This reply brief was written because of three very important cases recently decided which we now call to the attention of the court.

The first is *Bevilacqua vs. United States, Yentsch v. United States,* 122 F. Supp. 493, where the facts were as follows: The Federal Government erected a series of navigation locks along the Allegheny River. These locks were operated by the Corps of Engineers of the United States Army. Lock No. 8 was one of the series of locks erected by the Government in accordance with a uniform system in

effect at all the locks. Certain electric lights were maintained to warn navigators on the river of the peril to navigation created by the dam. The power generating equipment for the lights did not function during the hours between 11 P.M. and 7 A.M., and, therefore, during those hours navigators were warned of the peril to navigation by kerosene lanterns. It was the duty of some employee of the Government to light these lanterns each night at 11 P.M. At approximately 12:05 A.M. of July 15, 1951, Yentsch and Bevilacqua, libellants intestates, went over the dam at Lock No. 8 and met their death. Judge Gourley, Chief Judge of the United States District Court for the Western District of Pennsylvania, found that, as a matter of fact, the kerosene lanterns at Lock No. 8 were not lit on the night in question, and that the failure to light them was the proximate cause of the death of Yentsch and Bevilacqua. Judge Gourley further stated:

> "It is neither necessary nor appropriate to inquire into whether the chief administrative officer of the Corps of Engineers might have decided, in an exercise of discretion, that the locks should be left in darkness when unattended. It is enough that superior officers have promulgated an unqualified rule to the effect that the lock should not be left in darkness. It is clear that the negligence herein charged was in no manner associated with an exercise of discretion. U. S. v. Hull, 1 Cir., 195 F.2d 64; Jackson v. U. S., 3 Cir., 196 F.2d 725; Costley v. U. S., 5 Cir., 181 F.2d 723."

The *Bevilacqua* case is exactly parallel with the one at hand. The lanterns were placed on the river as an aid to navigation, just as the lighthouse in our case was

placed near Chandeleur Island as an aid to navigation. The decision to place the lights in both instances had been made before any damage was done, and the subordinate charged with the duty of lighting and maintaining the lights, in each case, was without discretion—he simply had a duty to perform.

The second case we wish to call to the attention of the Court is *Pennsylvania R.R. Co. v. United States, et al.; A. & M. Trading Corp., et al. vs. United States; Rinn vs. United States; Geary v. United States, et al.*, and related cases, 124 F. Supp. 52. The *Pennsylvania Railroad Company* case is very similar to the case of *Dalehite vs. United States*, except that in the *Pennsylvania* case after the Coast Guard had used discretion in deciding that certain lighters could be loaded with high explosives, there were individual acts of negligence pleaded on the part of the Coast Guard Officer who was in charge of the operation. As a matter of fact, there were serious charges of negligence made against the Captain of the Port and his Chief Engineer as individuals after the decision to allow the loading had been made. The Court held that insofar as allowing the loading was concerned, this was an act of discretion, but as soon as it had been decided to allow the lighters to be loaded, the discretion ended, and that acts of negligence in loading made the United States liable under the Federal Tort Claims Act.

We also wish to call Your Honors' attention to the decision of *Eastern Air Lines, Inc. vs. Union Trust Company, et al.*; Nos. 11,991 and 11,992, and *United States of America vs. Union Trust Company, et al.*, Nos. 12,017 and

12,018, United States Court of Appeals for the District of Columbia Circuit, decided February 8, 1955. The statements of the Court to which we wish to call your particular attention are:

"The holding of the *Costley*, *Somerset* and *Gray* cases was neither overruled nor impaired by the later decision of the Supreme Court in *Dalehite vs. United States*, 346 U.S. 15 (1953)."

* * * * * * * * *

"The Government says the *Somerset Seafood Company* case was overruled by the *Dalehite* opinion. We think not; our analysis of that opinion convinces us to the contrary."

* * * * * * * * *

"We may fairly infer from the statement just quoted that the United States is liable for the negligence of its employees at the operational level, where there is no 'room for policy judgment and decision'. This leads us to the Government's argument that the negligence charged against the tower operators is the same as that charged against the Coast Guard in the *Dalehite* case, which the Supreme Court held was not actionable because of the discretionary exception. We quote in the margin the Supreme Court's disposition of the alleged negligence of the Coast Guard.

"The Court made it clear that, as far as the alleged official dereliction of duty in failing to police the shipboard loading was concerned, the decision not to do so had been made at a policy-forming level and was not the decision of the individual members of the Coast Guard whose duty it would have been to do the policing had they been instructed to do it. The Court said:

> "To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.'

"We may paraphrase the quoted sentence thus:

> "'To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for the failure of the CAA to take over for maintenance and operation a certain air traffic control tower.'

"Had the Coast Guard authorities decided to supervise the storage, we have no doubt the United States would have been liable in tort for any causal negligence of its personnel acting at the operational level. So it is here: discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

* * * * * * * *

"The three negligent omissions and the one affirmative negligent act found by the court were not 'decisions responsibly made at a planning level' and did not involve any consideration important to the practicability of the Government's program of controlling air traffic at public airports. The tower operators acted, and failed to act, at an operational level. While they were in a sense exercising discretion as to what they should and should not do, they were not performing the sort of discretionary functions contemplated by § 2680(a) and clearly described in the *Dalehite* decision."

Finally we call Your Honors' attention to *Martin vs. Bd. of Fire Com'rs. for City of New Orleans*, 132 La. 187, 61 So. 197 and *Barnes vs. District of Columbia*, 91 U.S. 440, 23 L.Ed. 440.

Respectfully submitted,

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CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel by depositing in the U. S. Mail on this, the .... day of February, 1955.

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